U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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U.S. Citizenship and Immigration Services

[redacted]

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DATE: APR 28 2011 Office: CALIFORNIA SERVICE CENTER FILE: WAC 09 098 50294

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter to the director for entry of a new decision.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a Danish partnership registered to do business in Hawaii as a United States branch office. The petitioner seeks to employ the beneficiary as the manager of its new branch office for a period of three years.[1] The petitioner indicated on the Form I-129, Petition for a Nonimmigrant Worker, and on the L Classification Supplement to Form I-129, that it seeks to classify the beneficiary as an L-1B intracompany transferee in a specialized knowledge capacity.

The director denied the petition on May 19, 2009, concluding that the petitioner failed to establish that the beneficiary has been or would be employed in a managerial or executive capacity. The director acknowledged that the petitioner indicated that it was seeking to classify the beneficiary as an L-1B specialized knowledge worker, but noted that, based on the petitioners designation of the position as "manager," the petition was adjudicated under the L-1A classification for managers and executives.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the petition was erroneously adjudicated pursuant to the statutory and regulatory provisions applicable to L-1A managers and executives. Counsel requests that the petition be adjudicated under the requested L-1B classification and notes that the beneficiary does in fact possess knowledge that is essential to the expansion of the newly established U.S. branch of the business.

I. The Law

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

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[1] Pursuant to the regulation at 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*), if the beneficiary is coming to the United States to open or be employed in a new office, the petition may be approved for a period not to exceed one year.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(3)(vi) states that if the beneficiary is coming to the Untied States in a specialized knowledge capacity to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The business entity in the United States is or will be a qualifying organization as defined in paragraph (l)(1)(ii)(G) of this section; and

(C) The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

> [S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

II. The Issue on Appeal

The primary issue raised by the petitioner on appeal is whether the director erred by adjudicating the instant petition as one filed on behalf of a beneficiary who will be employed in a managerial or executive capacity.

The evidentiary criteria to be applied in this matter are dependent upon which L-1 classification the petitioner requested as of the date of filing. Upon review of the Form I-129, Petition for a Nonimmigrant Worker, filed on February 17, 2009, it is noted that at Part 2, item 1, Requested Nonimmigrant Classification, the petitioner or its representative marked "L-1B." On the L Classification Supplement, at Section 1, item 1, where asked to indicate the classification sought, the petitioner marked "L-1B specialized knowledge." The petitioner also responded to item #13 on the L Classification Supplement, which pertains to L-1B employees.

Based on the petitioner's statements on Form I-129, the director improperly determined that the petitioner filed an L-1A classification petition. The director then issued a nine-page request for evidence (RFE) on February 26, 2009 in which he failed to acknowledge the petitioner's filing of an L-1B classification petition, and instead requested certain evidence that is only applicable to L-1A managers and executives and new office petitions involving managers and executives. The director denied the petition solely on the grounds that the petitioner failed to meet is burden to establish that the beneficiary has been and would be employed in a primarily managerial or executive capacity.

The AAO concurs with counsel's contention that the director clearly erred by failing to adjudicate the petition according to the statutory and regulatory provisions applicable to the requested L-1B classification. The petitioner bears the burden of proof with respect to the specific visa classification that they request on the Form I-129 and cannot be required to meet the burden of proof for an alternative classification. U.S. Citizenship and Immigration Services (USCIS) will only consider the visa classification that the petitioner annotates on the petition, and has no authority to consider other classifications in the alternative.[2]

Here, the director failed to consider the beneficiary's eligibility under the requested L-1B classification, and had no authority to adjudicate the petition under an alternate classification. The director failed to reach any conclusion regarding the beneficiary's eligibility under the requested classification, and instead determined that the beneficiary did not qualify under an alternative classification which is governed by different statutory and regulatory provisions and evidentiary requirements.[3]

At this time, the AAO takes no position on whether the beneficiary qualifies for the classification sought. The director must make the initial determination on that issue. So far, the director has not done so. By remanding this matter, the AAO does not necessarily find that the beneficiary is ineligible. Rather, we remand the matter because the director based the decision on incorrect grounds and failed to address the beneficiary's eligibility under the requested classification.

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[2] The Ninth Circuit has determined that once USCIS concludes that an alien is not eligible for the specifically requested classification, the agency is not required to consider, *sua sponte*, whether the alien is eligible for an alternate classification. *Brazil Quality Stones, Inc., v. Chertoff*, Slip Copy, 2008 WL 2743927 (9th Cir. July 10, 2008).

[3] The director's decision, on Page 6, states: "[E]ven if the petitioner would claim that the beneficiary's position is to that of a specialized knowledge. [*sic*] There's nothing in the record that the beneficiary has specialized knowledge. Customer service, speaking and writing in Danish language does not constitute specialized knowledge by regulation." The AAO cannot find that three sentences within a seven-page decision constitutes a proper adjudication of the petitioner's request for L-1B classification. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

Accordingly, the AAO will withdraw the director's decision and remand the petition to the director for entry of a new decision. The director is instructed to review the petition pursuant to the above-cited statutory and regulatory provisions applicable to the L-1B nonimmigrant classification, and to request any additional evidence deemed necessary to adjudicate the petition.

As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.